

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IAN MICHAEL KLEIN,

Defendant-Appellant.

UNPUBLISHED

October 16, 2003

No. 241219

Emmet Circuit Court

LC No. 01-001781-FH

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of negligent homicide, MCL 750.324, and marijuana use, MCL 333.7404(2)(D). The trial court sentenced him to concurrent terms of thirty days in jail for the marijuana conviction and eleven months in jail and five years' probation for the negligent homicide conviction. We affirm.

Facts

The trial took place in February 2002. Rose Kuznicki, defendant's ex-wife, testified as follows: She, defendant, and their nine-month-old son, Ayden, went by automobile from their home in Emmet County to an automobile show in St. Ignace on June 24, 2000. Upon arriving in St. Ignace around 11:00 a.m. or noon, she and defendant shared a marijuana cigarette. After "a couple of hours," they left the automobile show and drove to Cheboygan with the intention of going to Wal-Mart. Instead, they met up with a friend, Wesley Eagleson, and ended up going to a craft show, for forty-five minutes to an hour, and then to the beach. On the beach, around 5:00 p.m., she and defendant smoked more marijuana while Wesley watched Ayden. She felt intoxicated from the marijuana, and she believed that defendant was also intoxicated from it. She remembered holding Ayden on the beach, and the next thing she remembered after that was waking up in the hospital with several broken bones and contusions. She was told that she had been in an automobile accident. She remained in the hospital for two months.

Kuznicki testified that defendant told her to refrain from telling the police that she and defendant had smoked marijuana on the day in question. She stated that she initially followed defendant's instruction but then later told the police the truth about the marijuana.

On cross-examination, Kuznicki admitted that she could not remember if defendant displayed any signs of intoxication on the day of the accident, and she also admitted that their automobile had been making a “clunky noise in the front end” about a month before the accident.

Wesley Eagleson testified as follows: He happened upon defendant, Kuznicki, and Ayden in Cheboygan on the day in question and rode with them to the beach. He could see defendant and Kuznicki smoking something on the beach, but neither of them appeared to be intoxicated. The four of them then left the beach in defendant’s automobile, and Eagleson heard an audible “clunk” after the vehicle starting moving, but the noise did not appear to affect the vehicle’s performance. They then proceeded to Wal-Mart and to a video store. Subsequently, defendant and Kuznicki took Eagleson to his motorcycle, and he decided to follow them on the motorcycle to their home in Emmet County. At one point during the drive he came down a gradual hill and realized that defendant’s vehicle had hit a tree and was off the road. Defendant had been driving the vehicle when it hit the tree.

Eagleson testified that defendant had not been driving erratically on the day in question. He further testified that both he and defendant were traveling around forty-five to fifty miles an hour at the time of the accident.

Timothy Allore testified that he saw defendant’s vehicle right before the crash on June 24, 2000, around 9:00 p.m. He stated that he observed the vehicle drift slowly and smoothly across the center line and then saw it against a tree on the opposite side of the road on which it had been traveling. Allore, as well as another person who happened upon the scene of the accident, testified that they did not observe signs of intoxication in defendant.

Scott Barrett, a sergeant with the Emmet County Sheriff’s Department, testified that he was dispatched to the scene of the accident on June 24, 2000. Barrett testified that defendant told him he was taking a medication, Ativan, for anxiety relief. Barrett further testified that when he asked defendant about whether he had used marijuana before the accident, defendant “[i]mmediately denied it and asked why I would ask such a question.” According to Barrett, defendant stated that he did not want to talk about marijuana use but that he would talk about it later. A test of defendant’s urine revealed the presence of marijuana.

Scott Chamberlin, a deputy sheriff with the Emmet County Sheriff’s Department who is trained in motor vehicle accident investigation, testified that he found no skid marks on the road at the point where (based on the accident reconstruction) the vehicle would have crossed the center line. He stated that the accident was consistent with the vehicle having “drifted over the center line and into the wrong lane of traffic.” He further stated that, based on his analysis of the marks around the accident scene, he did not believe that the brakes of the vehicle had been applied, that any evasive steering had occurred, or that there had been a defect with the tires or wheels or another part of the vehicle. Chamberlain testified that the road surface in question was asphalt and did not have any major potholes.

Chamberlain testified that he spoke with defendant after the accident. Chamberlain stated:

He said he looked back and saw the field and he described it to me as he had a blank spot. The next thing he knew he was off into the ditch. His wife – he

heard his wife scream and he said he hit the brakes; and he said he was holding on to the steering wheel and he told me he couldn't remember if he actually turned it or not, and told me the next thing he remembered was hitting the tree and then he had another blank spot. And then remembered pulling his wife from the vehicle.

According to Chamberlain, defendant stated that he had smoked marijuana about a week before the accident and had taken Ativan the day of the accident to help with a panic attack. Chamberlain testified that defendant did not mention any type of mechanical failure to him.

On cross-examination, Chamberlain admitted the possibility that defendant had braked the vehicle when it was quite close to the tree that it ended up hitting. He also admitted that the accident scene was consistent with the driver having lost control of the steering of the vehicle.

Charles Beckwith, a patrol supervisor with the Cheboygan County Sheriff's Department with experience in accident reconstruction, testified that, based on his analysis of the accident, the spindle of the right front wheel of the vehicle might have broken as a result of the collision with the tree.¹ He further testified that if the right front spindle broke while the vehicle was still on the roadway, the vehicle should have veered to the right, not to the left, because of the crown of the roadway. On cross-examination, however, he admitted that additional mechanical factors could cause the vehicle to veer to the left. He also admitted that pictures of certain accident markings were consistent with the right front wheel of the vehicle having become detached before the vehicle hit the tree.

Darryl Burr, a mechanic, testified that he examined defendant's vehicle at the request of the police and found no reason why the brakes would not have worked properly if they had been applied. He further testified, after looking at photographs of the vehicle, that the right front spindle of the vehicle was broken and that this type of break normally would not occur unless the vehicle had hit something. He also testified that in the type of vehicle involved in the accident, the steering is mainly controlled by the left wheel, so the driver would likely maintain some steering control even if the right spindle broke.

Matthew Breed, a public safety officer for the city of Petoskey trained in accident reconstruction, disagreed that the accident markings were consistent with the right front wheel having become detached before the impact with the tree. He stated that he observed no signs of braking or of mechanical failure leading to the accident. According to Breed, if the right front spindle had broken and caused the accident, certain markings would have been apparent in the roadway or the ditch, but such markings were absent.

Patrick Kuznicki, Rose Kuznicki's brother, testified that he is an automobile mechanic and that he inspected defendant's vehicle in the summer of 2000, sometime before the accident, because there had been an intermittent clunking noise in the front end of the vehicle and an intermittent clicking noise upon turning. He stated that he could not hear the noises on his test drive of the vehicle and that no parts appeared to be loose.

¹ The prosecutor intimated that the defense would be claiming that a broken spindle on the right front wheel *caused* the accident.

After the prosecutor rested his case, the parties stipulated that (1) Ayden died as a result of the accident; (2) Rose Kuznicki suffered a serious impairment of body function as a result of the accident; (3) “marijuana may be found in the urine for up to three weeks after a person has used it;” and (4) although Ativan was not found in defendant’s blood according to a laboratory report, “it may have been below cutoff levels for detection.”

Frank Harman Underdown, Jr., Ph.D., testified for the defense as an expert in physics, material science, and motion analysis. He examined the vehicle in a junkyard after the accident and found that the right front spindle was broken. He indicated that he could not say with certainty whether it broke before or after the impact with the tree, but he stated that the direction of the break and the condition of the surrounding parts suggested that the break was *not* caused as a result of the vehicle hitting the tree. He further indicated that a slight “cock” in one of the wheels of an automobile could cause the automobile to veer to the left instead of to the right while traveling down a crowned road. He also disputed that the steering in defendant’s vehicle was controlled by the left wheel; he claimed it was controlled “in the center.”

On Count I, involving Ayden, the jury rejected the higher charge of operating under the influence causing death and instead convicted defendant of negligent homicide. On Count II, involving Rose Kuznicki, the jury rejected both higher charges – operating under the influence causing death and felonious driving – and instead convicted defendant of marijuana use.

Denial of Directed Verdict

On appeal, defendant first argues that the trial court erroneously denied his motion for a directed verdict with regard to the charge of operating under the influence causing death. Defendant contends that submitting this charge to the jury caused it to compromise by convicting him of the lesser charge of negligent homicide. We disagree that the trial court erred.

In analyzing a trial court’s denial of a motion for a directed verdict, we consider the evidence presented up to the time the motion was made. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). “[W]e review the record de novo and consider the evidence presented by the prosecution in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt.” *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

One commits the crime of operating under the influence causing death if he operates a motor vehicle while “under the influence of . . . a controlled substance” and thereby causes a death.² See MCL 257.625. The following evidence presented by the prosecutor supported the trial court’s decision to submit this charge to the jury: (1) Rose Kuznicki’s testimony that defendant smoked marijuana on two occasions the day of the accident; (2) Rose Kuznicki’s testimony that she believed defendant became intoxicated from the marijuana; (3) Timothy

² We note that under a 1993 amendment, it is now illegal to operate a motor vehicle on a highway with *any* amount of marijuana in one’s body (with the exception of marijuana used for medical research purposes), regardless of whether one is intoxicated from the marijuana. See MCL 257.625(8).

Allore's testimony that the vehicle in question drifted slowly and smoothly across the center line before hitting the tree; (4) Scott Barrett's testimony that a test of defendant's urine revealed the presence of marijuana; (5) Scott Chamberlain's testimony that, based on his analysis of the accident scene, he did not believe the vehicle had had a mechanical problem; and (6) Scott Chamberlain's testimony that defendant told him he had a "blank spot" before the accident. In light of this evidence, the jury could reasonably have concluded that defendant hit the tree with his vehicle because he was under the influence of marijuana. Accordingly, the trial court did not err by submitting the charge in question to the jury. There is no evidence of jury compromise.

Evidence of Marijuana Use

Next, defendant argues that a new trial is warranted because the jury improperly heard evidence that he normally smoked marijuana "through the day." We review a trial court's decision to admit evidence for an abuse of discretion. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Moreover, MCL 769.26 states that

[n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of . . . the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

This statute "creates a presumption that preserved, nonconstitutional error is harmless, which presumption may be rebutted by a showing that the error resulted in a miscarriage of justice." *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999). "In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). "An error is deemed to have been 'outcome determinative' if it undermines the reliability of the verdict." *Id.* "In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *Id.*

Here, in light of the clear and admissible testimony that defendant did in fact smoke marijuana on the day in question and that marijuana was detected in his urine, we cannot conclude that the evidence of him normally smoking "through the day" likely affected the outcome of the case. Accordingly, reversal is not warranted. *Id.*

Defendant also contends that his trial attorney rendered ineffective assistance of counsel by withdrawing his objection to the testimony in question. Defendant has not established an ineffective assistance claim because he cannot show that his attorney's failure to object to the comments likely affected the outcome of the case. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Although his argument is less than clear, defendant also appears to contend that *no* evidence of marijuana use should have been presented at trial because it was irrelevant to the driving offense.³ This argument is without merit. The prosecutor's theory of the case was that defendant caused injury and death to the victims because he was operating a motor vehicle while under the influence of marijuana. Therefore, evidence of marijuana use was vital to the prosecutor's case, and the trial court properly admitted it.

Sentencing

Next, defendant argues that the trial court, in fashioning a sentence for the negligent homicide offense, improperly relied on the evidence about marijuana use, even though the jury rejected the charge of operating under the influence causing death and even though there was no evidence that defendant was driving under the influence of marijuana at the time of the accident.

This Court reviews sentencing decisions for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Because the negligent homicide offense was committed after January 1, 1999, the statutory guidelines apply. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range. MCL 769.34(2). If the minimum sentence imposed is within the guidelines' range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the sentencing guidelines or absent inaccurate information relied upon in determining the defendant's sentence. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Moreover,

[a] party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. [MCL 769.34(10).]

Defendant was sentenced on the negligent homicide conviction to eleven months in jail. This sentence was within the sentencing guidelines' minimum sentence range, considering the sentencing variables.⁴ Moreover, defendant did not raise the issue of the alleged sentencing errors in the manner required by MCL 769.34(10). Accordingly, we decline to address the issue.

Defendant makes a brief suggestion that his attorney's failure to challenge the trial court's articulated basis for the sentence constituted ineffective assistance of counsel. We

³ Defendant neglects to address the fact that on both counts, the jury was instructed with regard to the lesser offense of marijuana use. Clearly, evidence of marijuana use was relevant to these lesser charges. Evidently, defendant believes that the marijuana use charges should have been presented in a separate trial from the driving offenses.

⁴ We note that, on appeal, defendant does not challenge the scoring of the sentencing variables.

discern no ineffective assistance of counsel because defendant cannot establish that his attorney's inaction was unreasonable or that it likely affected the outcome of the case. *Toma, supra* at 302-303. Indeed, even though the jury rejected the charge of operating under the influence causing death, the trial court was entitled to conclude that defendant's marijuana use affected, in some fashion, his driving on the day of the accident. See, generally, *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003).

The trial court stated, in part:

The evidence about mechanical failure, frankly, didn't impress this Court at all and even if there was mechanical failure to the vehicle, if you had been sharp, if you'd been wide awake and not getting over a day of activities that included using intoxicating substances, I have to think that the outcome would have been different and we all wouldn't be here today and you wouldn't have to live with the things you're going to have to live with, and your wife wouldn't have to deal with the tragedy in her life, either.

Moreover, the sentencing information report stated that "[t]he use of the drug may not have caused the accident, but it is difficult to accept that it was not a major factor."

The trial court's statements on the record and the statement in the sentencing information report about the marijuana conformed to the evidence at trial, and we therefore conclude that an objection by defense counsel would not have been successful. "[C]ounsel is not required to advocate a meritless position." *Snider, supra* at 425.

Ineffective Assistance

Finally, defendant argues that his trial attorney rendered ineffective assistance of counsel in several additional respects (i.e., in addition to the allegations of ineffective assistance he raises with regard to the marijuana use and sentencing issues discussed above).⁵ "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that counsel's error or errors likely affected the outcome of the case. *Id.*; *Toma, supra* at 302-303; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant first contends that his attorney should have ensured that defendant's blood sample was preserved, should have ordered independent tests of defendant's blood and urine, and should have presented expert testimony that "the passage of time in this case prohibited any conclusion that marijuana would have affected [defendant's] driving at the time of the accident" Defendant has not met his appellate burden with respect to this issue. Indeed, he presents

⁵ We note that this Court denied, at an earlier date, defendant's request for a remand with respect to the issue of ineffective assistance of counsel.

no evidence or affidavit that an expert would indeed have been willing to testify about the negligible effect of the marijuana, given the alleged passage of time between the accident and defendant's use of the marijuana. There is no indication that independent testing would likely have helped defendant's case in light of the time sequence at issue. Defendant has simply not shown that counsel's inaction likely affected the outcome of the case. *Effinger, supra* at 69.

Second, defendant contends that counsel improperly failed to call an accident reconstructionist as an expert witness, failed to have the right front spindle of the vehicle tested to determine the cause of its failure, and failed to make a motion for investigative assistance in the circuit court. Once again, defendant has not shown that counsel's inaction in this regard likely affected the outcome of the case. Indeed, defendant implies that this potential evidence would have demonstrated that the right front spindle of the vehicle broke before the impact with the tree, thereby suggesting that the broken spindle, as opposed to driver error, caused the accident. However, Dr. Underdown testified at trial – as an expert in physics, material science, and motion analysis – about this same issue and stated that the spindle likely did not break as a result of the impact with the tree. We cannot conclude that cumulative testimony on this point would have affected the outcome of the case, given the evidence presented by the prosecutor.

Third, defendant contends that his trial attorney should have investigated defendant's reaction time and determined whether his "panic disorder condition was a factor in his reaction time." Again, defendant has not met his burden for appellate relief. Indeed, he presents no evidence or affidavits indicating that his individual reaction time was such that it lessened his culpability for the accident.⁶

Fourth, defendant contends that counsel should have provided Dr. Underdown with prosecution photographs of the accident scene. He states that "Dr. Underdown had requested an opportunity to examine all photographs taken by police, and the prosecutor used dozens of photographs at trial; at the time of trial, Dr. Underdown had been able to obtain only two photographs from defense counsel." Once again, defendant has not shown that counsel's alleged inaction in this regard likely affected the outcome of the case. *Id.* Indeed, defendant presents no evidence or affidavits indicating that an examination of the photographs would have allowed Dr. Underdown to provide additional favorable testimony for defendant at trial.

Fifth, defendant contends that counsel improperly failed to file a motion to quash the information. Defendant states:

⁶ While Dr. Underdown, in an affidavit, makes reference to an average reaction time, defendant does not make an argument about average reaction time on appeal; instead, he contends that his attorney should have determined *defendant's* reaction time and determined "whether [defendant's] panic disorder condition was a factor in his reaction time." Moreover, even if Dr. Underdown had testified at trial, in conformity with his affidavit, that the "accident was unavoidable" based on the average human reaction time, we cannot conclude that this testimony would have affected the outcome of the case. Indeed, this conclusion about "unavoidability" makes a large assumption – i.e., that the vehicle veered toward the tree because of mechanical failure and not because of driver error.

At [the] preliminary examination, the evidence supporting the [offense of] causing death and injury while driving under the influence of a controlled substance was exactly the same as that produced at trial. . . . That evidence was insufficient to support the bindover to Circuit Court.

We disagree. As discussed earlier, the testimony was sufficient to submit the higher charges to the jury. Accordingly, a motion to quash the information would have been futile, and “counsel is not required to advocate a meritless position.” *Snider, supra* at 425.

Finally, defendant contends that his attorney failed to ensure that the rear tires of the vehicle were retained for testing. He implies that the tires were needed so that Dr. Underdown could look for evidence of braking. Once again, defendant has not shown that counsel’s alleged inaction likely affected the outcome of the case. *Effinger, supra* at 69. Indeed, numerous prosecution witnesses testified that there was no evidence of braking at the scene. We have no reason to assume that an analysis of the tires would have contradicted this testimony.

Counsel vigorously advocated defendant’s position at trial, and the jury responded by rejecting the higher charges submitted to them. Defendant has not established that his attorney’s performance negatively affected the outcome of the case.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette